

# Case Note

## Court of Justice of the European Union Preliminary Ruling – Excise Duty on Certain Beverage Packaging: Case C-198/14 (*Valev Visnapuu*)

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*Both negative and positive harmonization are likely to restrict Member States' regulatory powers to protect the environment. Given that numerous environmental fiscal measures are likely to restrict one way or another inter-State trade, even though that may not be their objective, Member States are reluctant to foster green tax policies. Environmental protection measures and the free movement of goods enshrined in the Treaty on the Functioning of the European Union seem thus to be at odds with one another. The case under review raises some critical issues regarding the validity of environmental taxes on certain beverage packaging. The Court of Justice of the European Union has handed down a preliminary ruling that provides important clarifications in that respect.*

### INTRODUCTION

A central feature of European Union (EU) environmental law is its uncanny relationship with the internal market. Given that the internal market lies at the core of the EU integration process, which is underpinned by free movement principles removing obstacles to free trade and competition, the relationship between economic integration and environmental protection has always been fraught with controversy. In ensuring that tax policy does not serve protectionist interests, several provisions of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup> are likely to prohibit the adoption of fiscal instruments aimed at protecting the environment. A dividing line must be drawn between fiscal and non-fiscal obstacles to the free movement of goods. Indeed, when faced with a measure hindering inter-State trade, the practitioner will have to distinguish the prohibition of charges having equivalent effect to customs duties and of discriminatory internal taxation (either Articles 28 and 30 TFEU; or Article 110 TFEU) from quantitative restrictions on imports or exports or

any other measures having equivalent effect (Articles 34 and 35 TFEU). An excise duty that is clearly of a fiscal nature falls within the scope of Article 110 TFEU. In this context, it is important to assess whether such a tax discriminates directly or indirectly against foreign products.

### FACTS OF THE CASE

The Finnish law on excise duty on certain beverage packaging sets an excise duty of €0.51 per litre of packaged product. In order to foster a genuine waste management policy, beverage packaging is exempt from the payment of that duty, if it is part of a return system whereby beverage packaging is reused or recycled. This exemption aims at encouraging manufacturers and consumers to place on the market and purchase beverage packaging that is part of a return system.

Case C-198/14 arose from a dispute between Mr Visnapuu, acting on behalf of a company registered in Estonia, and the Finnish Customs Administration, regarding the imposition of excise duty on alcoholic beverage packaging which is not part of a return system.<sup>2</sup> That company sold to Finnish customers various brands of beverages with low or high alcohol contents via the internet and then delivered them directly to Finnish buyers.

In selling these alcoholic beverages, the company failed to pay the excise duties applicable when the packaging is not part of a return system. The Court of First Instance of Helsinki condemned Mr Visnapuu and ordered him to pay the unpaid taxes to the Finnish Customs Administration.

Claiming, among others, that the Finnish law on excise duty on certain alcoholic beverage packaging is indirectly discriminatory and therefore contrary to Article 110 TFEU, Mr Visnapuu appealed against that decision. The Helsinki Court of Appeal asked the Court of Justice

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<sup>1</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C326/47.

<sup>2</sup> ECJ, Case C-198/14, *Valev Visnapuu*, [2015] not yet reported.

of the European Union (CJEU) whether the tax at issue constituted a ‘measure having equivalent effect’ to ‘quantitative restrictions’ on imports (MEEs) under Article 34 TFEU or had to be classed as ‘internal taxation’ pursuant to Article 110 TFEU.

The Helsinki Court of Appeal asked the CJEU to consider also a question on the compatibility with the conditions laid down for State monopolies of a commercial character in Article 37 TFEU of the Finnish law on alcohol requesting a retail licence for the import and retail sale of alcoholic beverages. This case note only focuses on the consistency of Member States’ waste management schemes with EU law, and does not address questions related to the second request for a preliminary ruling by the CJEU.

## ABSENCE OF ENVIRONMENTAL TAX HARMONIZATION IN THE FIELD OF PACKAGING

Environmental taxes are levied either to raise revenue or to influence companies’ and consumer behaviour. Yet they may also afford protection to domestic products.

In contrast to the wide application of the ordinary legislative procedure to a number of internal market issues (Article 294 TFEU), given its sensitive nature, fiscal harmonization regarding ‘excise duties and other forms of indirect taxation’ is still subject to a special legislative procedure, pursuant to Article 113 TFEU. By the same token, environmental ‘provisions primarily of a fiscal nature’ have to be adopted in accordance with a special legislative procedure (Article 192.2(a) TFEU). It follows that fiscal EU measures have to be enacted by the Council acting unanimously and after consulting the European Parliament.

As a result, and in sharp contrast to the harmonization of product standards to enhance the internal market provided by Article 114 TFEU, and in spite of the obligation to implement the polluter pays principle,<sup>3</sup> the harmonization of eco-taxes has to date made no headway in EU law.

Given the absence of harmonization in this field, Member States have significant freedom to carry out their own tax policies. Hence, they are empowered to tax whatever products (waste, packaging, chemical substances, etc.) they wish and at whatever rate they wish. In that connection, *Futura Immobiliare* is a case in point. On that occasion, the CJEU noted that national authorities are endowed with ‘broad discretion’ when

determining the manner in which an environmental charge on household waste must be calculated.<sup>4</sup>

With respect to waste packaging taxation, it comes as no surprise that Member States’ tax policy has been pulled in different directions. Whereas several Member States levy taxes on packaging to raise revenue, others levy such taxes with a view to influencing companies’ and consumer behaviour. This is the case of the Finnish law on excise duty on certain beverage packaging, which provides for tax exemption in order to favour the purchase of beverages that are part of a return system. Given that there is no ‘EU eco-tax’ on beverage containers, Member States must ensure that their domestic excise duties do not infringe the economic freedoms enshrined in Treaty law.

## THE THREE SETS OF PROVISIONS OF PRIMARY LAW PROHIBITING OBSTACLES TO TRADE IN GOODS

Given that national measures establishing such eco-taxes must be assessed in the light of primary law, account must be taken of the fact that the TFEU contains three sets of provisions prohibiting obstacles to trade in goods between Member States: Articles 28 and 30 TFEU; Articles 34–36 TFEU; and Article 110 TFEU.

When faced with a fiscal measure, it is first necessary to distinguish the prohibition of charges having equivalent effect to customs duties (CEE) – Articles 28 and 30 TFEU – from discriminatory internal taxation – Article 110 TFEU. Articles 28 and 30 TFEU prohibit Member States from adopting customs duties on imports or exports or CEEs, whereas Article 110 TFEU condemns internal taxation of a discriminatory nature.

Where the measure is not deemed to be a fiscal barrier to trade, it may nevertheless fall under the prohibition of MEEs within the meaning of Article 34 TFEU. Article 34 TFEU has a general character compared to Articles 28–30 TFEU<sup>5</sup> and Article 110 TFEU.<sup>6</sup>

The scope of these provisions tends to differ according to the legal category to which they belong: to each barrier to the free movement of goods there is a corresponding prohibition governed by specific rules.<sup>7</sup> The

<sup>4</sup> ECJ, Case C-254/08, *Futura Immobiliare*, [2009] ECR I-6995, at paragraph 55.

<sup>5</sup> ECJ, Case 252/86, *Bergandi*, [1988] ECR I-1343.

<sup>6</sup> Case C-198/14, n. 2 above, Opinion of Advocate General Bot delivered on 9 July 2015, at paragraph 60.

<sup>7</sup> As to the manner in which environmental measures are caught by these economic freedoms, see N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press, 2014), at 229–469.

<sup>3</sup> N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002), at 44–49.

reason these provisions are mutually exclusive is that, while Member States may adopt taxes and charges within their general system of internal taxation inasmuch as they are not discriminatory, CEEs are categorically prohibited. MEEs can be justified in accordance with Article 36 TFEU or on the basis of an imperative requirement, insofar as they are proportionate to their objective. These provisions may not be cumulatively applied.<sup>8</sup> Table 1 distinguishes the tariff and non-tariff barriers to the free movement of goods.

## RESPECTIVE SCOPE OF ARTICLES 28 AND 110 TFEU

CEEs are protectionist and discriminatory, as they are levied on the crossing of borders. There is an absolute prohibition on such charges, as opposed to the rules applicable to MEEs or to internal taxation under Article 110 TFEU.<sup>9</sup>

The CJEU has defined the concept of CEEs in broad terms with the intent to avoid the emergence of new forms of customs duties.<sup>10</sup> It is settled case law that a CEE covers ‘any pecuniary charge, however small and whatever its designation and mode of application, which is ... unilaterally imposed on domestic or exported goods by reason of the fact that they cross a frontier of one of the Member States and which are not customs duty in the strict sense’.<sup>11</sup>

Though the Court in several cases has ruled that environmental charges may amount to CEEs,<sup>12</sup> it did not adjudicate that issue. Advocate General (AG) Yves Bot has expressed the view that

the disputed levy is charged on that beverage packaging not because it crosses a frontier but by reason of the fact that it is not part of a return system. In those circumstances, the excise duty provided for in the Law on excise duty on certain beverage packaging does not constitute a [CEE].<sup>13</sup>

<sup>8</sup> *Ibid.*, at 243.

<sup>9</sup> CJEU, Case 7/68, *Commission v. Italy*, [1968] ECR 423. See L. Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford University Press, 2009), at 384–386.

<sup>10</sup> CJEU, Case 2/62, *Commission v. Luxembourg*, [1962] ECR 425.

<sup>11</sup> ECJ, Case C-90/94, *Haahr Petroleum*, [1997] ECR I-4085, at paragraph 20; ECJ, Case C-213/96, *Outokumpu Oy*, [1998] ECR I-1777, at paragraph 20; ECJ, Case C-387/01, *Weigel*, [2004] ECR I-4981, at paragraph 64; and ECJ, Joined Cases C-393/04 and C-41/05, *Air Li- quide*, [2006] ECR I-5293, at paragraph 51.

<sup>12</sup> See N. de Sadeleer, n. 7 above, at 242.

<sup>13</sup> Opinion of Advocate General Bot, n. 6 above, at paragraph 51. See C. Barnard, *The Substantive Law of the EU*, 3rd edn (Oxford University Press, 2007), at 74; P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th edn (Hart, 2010), at 84–155; and C. Blumann et al., *Commentaire Mégret: Introduction au marché intérieur – libre circulation des marchandises* (Université de Bruxelles, 2015), at 268–320.

**Table 1.** Tariff and Non-tariff Barriers to the Free Movement of Goods

Tariff barriers to the free movement of goods	
Custom duties	Articles 28–30 TFEU
Charges having an equivalent effect thereto	Articles 28–30 TFEU
Discriminatory internal taxation	Article 110 TFEU
Non-tariff barriers to the free movement of goods	
Quantitative restrictions	Articles 34 and 35 TFEU
Measures having an equivalent effect to quantitative restrictions	Articles 34 and 35 TFEU
Exemptions to the prohibition of quantitative restrictions and measures having an equivalent effect to quantitative restrictions	Article 36 TFEU

That being said, even if a charge is not a CEE under Articles 28 and 30 TFEU, it may still be contrary to Article 110 TFEU.

## RESPECTIVE SCOPE OF ARTICLES 34 AND 110 TFEU

The definition of the respective scope of these provisions is far from a mere theoretical question. Article 110 TFEU does not overlap with Article 34 TFEU on account that the normative content and applicability conditions of both provisions differ greatly.

It is settled case law that because of its narrower scope, Article 110 TFEU is considered to be *lex specialis* when compared to Article 34 TFEU, the application of which is residual.<sup>14</sup> In effect, the CJEU has adopted a broad interpretation of the concept of MEEs, which encompasses all national measures which are ‘capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’.<sup>15</sup> The case law on this issue is somewhat sophisticated, given that the Court distinguishes between distinctly and indistinctly applicable measures and, more recently, ‘any other measure which hinders access of products originating in other Member States to the market of a Member State’.<sup>16</sup>

<sup>14</sup> ECJ, Case 27/67, *Fink-Frucht*, [1968] ECR I-327. See also ECJ, Opinion of Advocate General Jacobs delivered on 17 June 2003, Case C-383/01, *De Danske Bilimportører*, [2003] ECR I-06065, at paragraph 6030; Opinion of Advocate General Bot, n. 6 above, at paragraph 60.

<sup>15</sup> ECJ, Case 8/74, *Dassonville*, [1974] ECR 837, at paragraph 5.

<sup>16</sup> ECJ, Case C-110/05, *Trailers*, [2009] ECR I-519, at paragraph 37; ECJ, Case C-142/05, *Swedish Watercrafts*, [2009] ECR I-4273, at paragraph 24; ECJ, Case C-108/09, *Ker-Optika bt*, [2010] ECR I-12213, at paragraph 50. Vigorous debate ensued as to how to interpret these terms. See A.L. Sibony, ‘Can Market Access be Taken Seriously?’, 2 *European Journal of Consumer Law* (2012), 323; A. Fromont and C. Verdure, ‘La consécration du critère de l’accès au marché en matière de libre circulation des marchandises: mythe ou réalité?’, 47 *Revue Trimestrielle de Droit Européen* (2011), 716; M. Fallon and D. Gerard, ‘Trailing the Trailers in Search of a Typology of Barriers’, 2 *European Journal of Consumer Law* (2012), 258.

One may not derogate from Article 110 TFEU, even for ‘an overriding requirement relating to the public interest’ (hereinafter ‘mandatory requirement’), whereas Article 34 TFEU can be the subject of exemption that can be found in Article 36 TFEU. Besides, environmental protection in its own right is deemed to be an ‘overriding requirement relating to the public interest’ which justifies MEEs.<sup>17</sup>

While Article 110 TFEU is by definition ‘fiscal in purpose’,<sup>18</sup> Article 34 TFEU is concerned with non-fiscal barriers. In other words, the financial character of the contested domestic measure brings it within the scope of Article 110 TFEU and its main objective must be fiscal and therefore redistributive.

Both the AG and the CJEU stressed that the excise duty at issue was clearly of a fiscal nature on account that it was paid to the custom authorities on certain beverage packaging. As a result, the law on excise duty on certain beverage packaging fell within the scope of Article 110 TFEU.<sup>19</sup> It was thus not necessary to examine the duty in the light of Article 34 TFEU.

## CONSISTENCY OF THE FINNISH LAW ON EXCISE DUTY WITH DIRECTIVE 94/62

The Helsinki Court of Appeal asked the CJEU whether Articles 1.1, 7 and 15 of Directive 94/62 on packaging and packaging waste<sup>20</sup> should be interpreted as precluding the provisions of the Finnish law on excise duty aiming at favouring the reuse and the recycling of beverage packaging.

It is settled case law that where the matter is the subject of exhaustive, full or complete harmonization, the measure hindering the free movement of goods must be assessed solely in the light of the relevant provisions of secondary law. However, as long as the EU lawmaker has not pre-empted the field, the domestic measure has to be reviewed solely in the light of the relevant Treaty provisions.<sup>21</sup> For instance, as long as harmonization is not complete, Member States may invoke grounds

contained in Article 36 TFEU or a mandatory requirement with a view to impeding free movement of goods.<sup>22</sup>

Given that the formal existence of secondary law does not preclude the application of Treaty law, one has to assess whether the EU measures are subject to exhaustive harmonization. If the three provisions of Directive 94/62 give rise to an exhaustive harmonization of the subject matter, then the Finnish law on excise duty on certain beverage packaging has to be assessed solely in the light of those provisions.

On the one hand, the CJEU found that the marking and identification of packaging and the requirements on the composition of packaging and its capacity to be reused or recovered, governed by Articles 8 and 11 of Directive 94/62 and Annex II, are subject to complete harmonization. On the other hand, the CJEU ruled that there was no full harmonization of national systems for the encouragement of packaging reuse, as Article 5 of Directive 94/62 on packaging and packaging waste allows Member States to encourage, in conformity with the TFEU, systems of packaging that can be reused in an environmentally sound manner.<sup>23</sup> Along the same lines, AG Bot held that ‘the harmonising effect of Directive 94/62 remains limited in the field of the organisation of return systems for beverage packaging’.<sup>24</sup>

Article 7.1 of Directive 94/62, as well as establishing that Member States are required to take the necessary measures to set up return, collection and recovery systems, regulates the organization of those systems. It is clear from the wording of that provision that Member States have a degree of latitude in the actual organization of those systems.<sup>25</sup>

By the same token, the CJEU held that Article 15 of Directive 94/62 does not carry out any harmonization, but rather authorizes the Council to adopt economic instruments to promote the implementation of the objectives set by that directive or, in the absence of such measures, authorizes the Member State, acting ‘in accordance with . . . the obligations arising out of the Treaty’, to adopt measures to implement those objectives.<sup>26</sup>

Since the relevant provisions of Directive 94/62 have not been the subject of exhaustive harmonization, the

<sup>17</sup> See N. de Sadeleer, n. 7 above, at 296–300.

<sup>18</sup> A.G. Toth, *The Oxford Encyclopaedia of European Community Law: Volume II* (Oxford University Press, 2005), at 708.

<sup>19</sup> Opinion of Advocate General Bot, n. 6 above, at paragraph 62.

<sup>20</sup> Directive 94/62/EC of 20 December 1994 on Packaging and Packaging Waste, [1994] OJ L365/10.

<sup>21</sup> ECJ, Case 215/87, *Schumacher*, [1989] ECR 617, at paragraph 15; ECJ, Case C-369/88, *Delattre*, [1991] ECR I-1487, at paragraph 48; ECJ, Case C-347/89, *Eurim-Pharm*, [1991] ECR I-1747, at paragraph 26; CJEU, Case C-62/90, *Commission v. Germany*, [1992] ECR I-2575, at paragraph 10; and ECJ, Case C-320/93, *Ortscheit*, [1994] ECR I-5243, at paragraph 14; ECJ, Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz*, [2004] ECR I-11763, at paragraph 53.

<sup>22</sup> ECJ, Case C-323/93, *Centre d'Insémination de La Crespelle*, [1994] ECR I-5077; CJEU, Case C-249/92 *Commission v. Italy*, [1994] ECR I-4311; and ECJ, Case C-3/99, *Cidrerie Ruwet*, [2000] ECR I-08749.

<sup>23</sup> CJEU, Case C-463/01, *Commission v. Germany*, [2004] ECR I-11705, at paragraphs 37–45.

<sup>24</sup> Opinion of Advocate General Bot, n. 6 above, at paragraph 68.

<sup>25</sup> Case C-198/14, n. 2 above, at paragraphs 45 and 46; Opinion of Advocate General Bot, n. 6 above, at paragraph 71.

<sup>26</sup> Case C-198/14, n. 2 above, at paragraph 48.

Finnish excise duty had to be assessed in the light of the relevant provisions of primary law, in this case the first indent of Article 110 TFEU.

## CONSISTENCY OF THE FINNISH ON EXCISE DUTY WITH ARTICLE 110 TFEU

Article 110 TFEU is a necessary complement to the aforementioned provisions on the removal of barriers to free movement of goods,<sup>27</sup> and aims to eliminate 'all forms of protection which might result from the application of discriminatory internal taxation against products from other Member States, and to guarantee absolute neutrality of internal taxation as regards competition between domestic and imported products'.<sup>28</sup>

## WASTE AS A PRODUCT

The fact that waste for disposal has no market value does not imply that it is not covered by the concept of 'products' within the meaning of Article 110 TFEU. Indeed, waste for disposal, even if it has no intrinsic commercial value, may nonetheless give rise to commercial transactions in relation to the disposal or deposit thereof.<sup>29</sup> Accordingly, an excise duty on certain beverage packaging must be regarded as being imposed on products for the purposes of that provision.<sup>30</sup>

## SCOPE OF ARTICLE 110 TFEU

The scope of Article 110 TFEU is extremely broad. Whereas the first paragraph of the provision prohibits discrimination between 'similar' products, the second paragraph prohibits taxation of products aiming at affording protection to 'other' products.<sup>31</sup>

The first paragraph of Article 110 TFEU reads:

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

This paragraph prohibits Member States from taxing products of other Member States more heavily than similar domestic products. In other words, it only condemns the creation of fiscal discrimination.<sup>32</sup> It follows that although Article 110 TFEU is not intended to prevent a Member State from introducing new taxes or from changing the rate or basis of assessment of existing taxes, these powers to make tax arrangements are limited by the principle of non-discrimination.<sup>33</sup> Where the tax concerned is discriminatory in nature, 'the fact that the purpose of and reason for the tax may be environmental in nature or seek to reduce pollution has no bearing on any finding of infringement'.<sup>34</sup>

## DIFFERENTIATED SYSTEM OF TAXATION

Only beverage packaging which is part of a return system is exempt from the Finnish excise duty. Accordingly, the excise duty at issue applies to certain beverage packaging which is not part of a return system in that Member State.

In order to be admissible, such a charge must be part of a general taxation regime which applies the same criteria to domestic and foreign products and which is impartially warranted by the objective pursued. Differentiation is thus compatible with Article 110 TFEU if it fulfils the following requirements:<sup>35</sup>

- it must pursue aims compatible with the requirements of the Treaties and of secondary law (in this case Article 191 TFEU and Directive 94/62);
- it must be based on objective criteria;
- its rules and implications must avoid all types of discrimination.

Regarding the objectivity of the criteria, AG Bot held that, 'as a means of incentivising recycling, reuse or refilling, the excise duty is in line with the above-mentioned aims of Article 1 of Directive 94/62 to reduce the environmental impact of packaging waste'.<sup>36</sup>

The last condition is the most contentious: to be consistent with Article 110, excise duty must apply irrespective of the place of origin or the purpose of the beverage packaging. One therefore has to differentiate between direct and indirect discrimination.

<sup>27</sup> D. Berlin, *Commentaire Mégret: Politique fiscale* (Editions de l'Université de Bruxelles, 2012), at 37.

<sup>28</sup> CJEU, Case 356/85, *Commission v. Belgium*, [1987] ECR 3299.

<sup>29</sup> ECJ, Case C-221/06, *Stadtgemeinde Frohnleiten*, [2007] ECR I-9643, at paragraphs 36–38.

<sup>30</sup> Case C-198/14, n. 2 above, at paragraph 53.

<sup>31</sup> The CJEU ruled that the second paragraph did not apply in the case at issue.

<sup>32</sup> ECJ, Case 78/76, *Steinike & Weinlig*, [1977] ECR I-595.

<sup>33</sup> ECJ, Case C-402/09, *Ioan Tatu*, [2011] ECR I-02711, at paragraphs 50–52.

<sup>34</sup> ECJ, Opinion of Advocate General Sharpston delivered on 27 January 2011, Case C-402/09, *Ioan Tatu*, at paragraph 38.

<sup>35</sup> CJEU, Case 196/85, *Commission v. France*, [1987] ECR I-1597, at paragraph 6; and Case C-90/94, n. 11 above, at paragraph 29.

<sup>36</sup> Opinion of Advocate General Bot, n. 6 above, at paragraph 82.

## TAX EXEMPTION INDISTINCTLY APPLICABLE TO BOTH DOMESTIC AND FOREIGN PRODUCTS

Given that the Finnish excise duty on certain beverage packaging was payable on national and imported products, subject to the same conditions and on the same terms, it did not explicitly differentiate beverage packaging according to its origin.<sup>37</sup> Hence, the Finnish tax exemption applied to both domestic and foreign products.

## TAX EXEMPTION DISTINCTLY APPLICABLE DE FACTO

However, the fact the differentiated system of taxation is based on objective criteria does not obviate the risk of discriminatory fiscal treatment. In other words, even if the conditions for direct discrimination are not met, internal taxation may be indirectly discriminatory as a result of its effects.<sup>38</sup>

According to settled case law, an infringement of the first paragraph of Article 110 TFEU occurs when the tax on the imported product and the tax on the similar domestic product are calculated in a different way and under different conditions so that the imported product, even if only in certain cases, is more heavily taxed. Thus, under that provision, an excise duty must not affect products originating from other Member States more onerously than similar domestic products.<sup>39</sup> This case law has obvious practical consequences: if a Member State cannot, for practical reasons, provide tax relief aimed at domestic recyclable products to similar imported products, it will have to repeal its differentiated tax system.

With respect to waste management policy, *Stadtgemeinde Frohnleiten* is a case in point. The Court held that: 'While it may indeed be extremely difficult for the Austrian authorities to ensure that [contaminated] sites located in other Member States . . . satisfy the requirements laid down in the Austrian legislation', this cannot justify the application of 'the exemption applicable to waste from disused hazardous sites . . . in Austria' when importers of foreign waste cannot benefit from this exemption.<sup>40</sup> The Court's refusal to take into consideration practical difficulties arising from the extension of

tax relief to imported products has been criticized on the grounds that it was likely to jeopardize environmental taxation schemes.<sup>41</sup>

In the case under review, the question arose whether the costs of collection, transport and recycling of beverage packaging which was not part of a return system were likely to be higher than the costs of participating in a return system. In effect, in accordance with the 'polluter-pays' principle, those costs should be borne by the operators who choose not to take part in a return system.<sup>42</sup> Mr Visnapuu claimed that that Finnish legislation was discriminatory and contrary to Article 110 TFEU, since a seller operating from Estonia could not, in practice, join a functioning return system. Moreover, higher costs were stemming from the requirement to ensure that certain particulars appear on the beverage packaging and the requirement to lodge a guarantee and to pay a membership fee. These arguments were dismissed both by AG Bot and the CJEU, who took the view that a foreign operator was not at a disadvantage compared to a national operator insofar as a national operator is subject to the same requirements:<sup>43</sup>

It cannot be inferred from such difficulties encountered by a small trader engaged in distance sales in joining a functioning return system or setting up such a system that beverage packaging from other Member States is less likely to enjoy the exemption laid down for packaging integrated into a functioning return system and, consequently, is more heavily taxed than similar national products.<sup>44</sup>

Therefore, the conditions laid down by the Finnish authorities for joining the return system or for setting up such a system were not indirectly discriminatory. Consequently, Article 110 TFEU does not preclude a national legislation imposing an excise duty on certain beverage packaging that is promoting the recycling of packaging whenever national and foreign operators are subject to the same requirements. Practical difficulties faced by both foreign and domestic operators do not amount to a violation of Article 110 TFEU.

## CONCLUSIONS

The issues addressed by the CJEU in the case under review are of great practical significance, because of the risk of potential conflict between domestic tax

<sup>37</sup> Case C-198/14, n. 2 above, at paragraph 54; and Opinion of Advocate General Bot, n. 6 above, at paragraphs 79 and 80.

<sup>38</sup> Case C-402/09, n. 33 above, paragraph 37, and the case law cited therein.

<sup>39</sup> ECJ, Case C-313/05, *Brzeziński*, [2007] ECR I-00513, at paragraph 29, and the case law cited therein.

<sup>40</sup> Case C-221/06, n. 29 above, at paragraphs 70 and 71.

<sup>41</sup> CJEU, Opinion of Advocate General Mayras delivered on 13 December 1979, Case 21/79, *Commission v. Italy*, [1980] ECR I-1, paragraph 1. See also N. de Sadeleer, n. 7 above, at 256–259.

<sup>42</sup> Opinion of Advocate General Bot, n. 6 above, at paragraph 81.

<sup>43</sup> Case C-198/14, n. 2 above, at paragraph 63; and Opinion of Advocate General Bot, n. 6 above, at paragraph 91.

<sup>44</sup> Case C-198/14, n. 2 above, at paragraph 63.

mechanisms aiming at promoting recycling of packaging – soon to become widespread due to the impetus of the Circular Economy Package<sup>45</sup> – and primary EU law ensuring free inter-State trade of goods.

Member States retain a large measure of discretion in the field of taxation. Indeed, Article 110 TFEU does not prohibit them from adopting differentiated taxation for similar products, inasmuch as they aim to achieve legitimate economic and social objectives. In addition, fiscal measures adopted at the national level with a view to encouraging the recycling of packaging benefit from a presumption of legitimacy in the light of EU law on account that waste

management law promotes recycling over recovery.<sup>46</sup> However, if Member States retain sovereignty in pursuing such policy choices, they must not discriminate against foreign producers.

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<sup>45</sup> Commission of the European Communities, Communication on Closing the Loop – An EU Action Plan for the Circular Economy, COM (2015) 614.

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<sup>46</sup> Directive 2008/98/EC of 19 November 2008 on Waste and Repealing Certain Directives, [2008] OJ L312/3, Article 4.